United Food and Commercial Workers International Union, Local 1357 *and* Elizabeth Murphy. Case 4–CA–12427

February 7, 1991

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On January 30, 1990, Administrative Law Judge Arline Pacht issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Supplemental Order.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, United Food and Commercial Workers International Union, Local 1357, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The underlying decision is reported at 273 NLRB 299 (1984), enfd. 780 F.2d 1016 (3d Cir. 1985).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Bruce G. Conley, Esq., for the General Counsel.
Peter V. Marks, Sr. Esq. (Walters & Willig), of Philadelphia, Pennsylvania, for the Respondent.
Judith Brown Chomsky, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION—BACKPAY PROCEEDING

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On December 14, 1984, the National Labor Relations Board (the Board) issued a Decision and Order in this case directing the Respondent, United Food and Commercial Workers International Union, Local 1357, to reinstate the Charging Party, Elizabeth Murphy, to her former or substantially equivalent position and to make her whole for any losses she may have sustained as a result of Respondent's discriminatory conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] Thereafter, the United States Court of Appeals for the Third Circuit issued a judgment dated November 6, 1985, enforcing in full the provisions of the Board's Order.

On July 31, 1987, a backpay specification and notice of hearing issued alleging that a controversy had arisen over the amount of backpay due to the Charging Party, Elizabeth Murphy, and setting forth the amount of backpay allegedly due her. The Respondent filed an answer on August 17, 1987, as amended on February 16, 1988, and September 15, 1989. At the hearing, the General Counsel's motion to amend the specification by claiming additional sums owed Murphy for unused sick and personal days and for Christmas bonuses was granted. (G.C. Exh. 2.)[2]

The matter came before me for hearing in Philadelphia, Pennsylvania, on September 25 and 26, 1989, at which time the parties were afforded full opportunity to be heard, to call and examine witnesses, and to argue orally on the record. Subsequent to the hearing, Respondent offered certain exhibits into evidence under cover letters dated October 2 and 6, 1989.[3] Thereafter, counsel for the General Counsel (General Counsel), the Charging Party, and the Respondent filed briefs which has been carefully considered.

On the basis of the the pleadings and the record in this case, the principal issues to be resolved are:

1. Whether Murphy made a reasonably diligent effort to seek alternative employment throughout the backpay period.
2. Whether the backpay specification failed to take into account interim earnings in the form of room and board for services rendered by Murphy while Murphy resided at a convent.
3. Whether Murphy's projected hours of employment during the backpay period should include overtime.
4. Whether Murphy is entitled to reimbursement for a 1982 Christmas bonus and for unused sick and personal days.

FINDINGS OF FACT

The Compliance Supervisor's Calculations

According to the backpay specification, as amended, Respondent's net backpay obligation to Murphy, running from July 27, 1981, until November 24, 1986, the date she was offered reinstatement totaled $104,804.42 plus interest. This sum includes amounts allegedly owed for Christmas bonuses and unused sick and personal days, as set forth in an amend-

[1] 273 NLRB 299 (1984).

[2] Throughout this decision, the General Counsel's exhibits will be referred to as GCX followed by the exhibit number; the Respondent's exhibits will be cited as RX and the Charging Party's exhibits as CPX.

[3] At the hearing, the parties agreed that Respondent could offer into evidence records which might show that a Christmas bonus had not been paid in each year of the backpay period involved in this proceeding. Pursuant to this agreement, Respondent forwarded several documents under cover letter of October 6, 1989. They are received into evidence as RX 10, and will be discussed further below.

Under separate cover letter of October 2, 1989, Respondent also offered into evidence records bearing on Elizabeth Murphy's attendance history in 1987, 1988, and 1989. The General Counsel filed a motion to strike, arguing that because Respondent had failed to request an opportunity to submit such additional evidence during the hearing, the offer was untimely. The record fully supports the General Counsel's position. Moreover, I do not regard attendance records for periods following Murphy's reinstatement relevant to her entitlement to backpay prior to that time. Accordingly, Respondent's offer, marked for identification as RX 9, is rejected.

ed specification. Another $292.50 admittedly was owed for Murphy's medical expenses and $9,213.92 for pension plan contributions.

James Burkholder, compliance supervisor for Region 4 of the National Labor Relations Board, testified about the premises and methods he employed to calculate the backpay sums set forth in the specification. First, he determined that although Murphy was terminated on July 14, 1981, the backpay period began a week later on July 27 when she had recovered sufficiently from various health problems to be available for employment. Then, from records submitted by the Respondent, Burkholder focused on a 5-1/2-month period prior to her discharge as a representative reflecting of her actual wages and hours worked, including overtime. From these records, he determined that Murphy actually worked 34.875 regular hours and a weekly average of 1.825 hours overtime for a total of 37.61 hours per week during this period. He then multiplied this figure by the contractual wage rates established in the parties' collective-bargaining agreement, and multiplied those totals by the number of weeks in each quarter of the backpay period to derive quarterly gross backpay amounts.

Next, the compliance officer requested that Murphy provide him with her tax records, payroll stubs, and various other materials to evidence her efforts to obtain other employment and document her earnings during the backpay period. He then deducted her interim earnings from the gross backpay figures to arrive at the net backpay sums set forth in paragraph 4 of the specification.

Based on discussions with Murphy, Burkholder concluded that she was a guest at the convent; that any chores she performed there were not obligatory, nor exchanged for room and board. Rather, he considered her services to the convent more like favors which did not have to be assigned a value or credited as interim earnings.

Murphy's Efforts to Obtain Employment

Murphy was 47 years old at the time of her discharge, having worked for the Respondent since 1966 as a receptionist and telephone operator. She also performed some secretarial duties and reviewed applications as a loan officer for the credit union. In addition, she was the shop steward for the Seafarers International Union, and participated in collective-bargaining negotiations between that union and the Respondent.

Before accepting employment with the Respondent, Murphy worked briefly for COPE, the political action arm of the AFL–CIO. Prior to that, for most of her adult life, Murphy was a Roman Catholic nun, teaching first grade at a parochial school in Philadelphia. Although she took some preparatory courses, Murphy was not college-educated.

Murphy testified that she was severely shaken by the circumstances attending her discharge. As a consequence, she returned to St. Bonaventure convent, seeking the moral support and friendship of the sisters with whom she previously lived and whom she regarded as family. While a guest at the convent, Murphy entered into the life there, taking her meals with the sisters and participating in prayer services. Although not required to perform any chores, she voluntarily assisted in a variety of ways: answering the phone, housecleaning, taking elderly Sisters to medical appointments, buying groceries, and the like. In addition, she spent approximately an hour or two a week helping Sister Gloria Keltz, principal at the St. Bonaventure School, where for an hour or two a week she performed a number of ministerial tasks including cleaning the office, answering the phone, or occasionally preparing snacks to be served to the schoolchildren. Except for a few weekend visits with lay friends and a family member, Murphy resided at the convent from August 1981 to July 1982 and from October 1982 to May 1983. Throughout her stay there, she continued to maintain and pay rent on an apartment which she visited from time to time, principally to collect her mail.

Sisters Keltz and Marcella Francis Millhouse, nuns who were particularly close to Murphy, testified that she was ill when she returned to the St. Bonaventure community after losing her job. They also noted she was under great stress and was receiving treatment for diabetes and injuries sustained when Respondent's president ejected her forcibly from his office. They explained that on occasion, friends and family members who were experiencing certain crises like Murphy, were taken into the fold, and were permitted to remain at the convent where they received spiritual and moral support. The Sisters subsequently wrote a letter on Murphy's behalf setting forth their observations of her condition. Thus, they wrote that when she first came to the convent she ''was *very* sick and *extremely* stressed and upset . . . after the injury to her at work.'' (RX 3.) However, they maintained, as did Murphy, that neither her physical nor emotional state caused her to be bedridden or prevented her from seeking employment.

Murphy further related that she was available for employment after July 27, 1981, when she received a medical release from her attending physician. Thereafter, she made assiduous efforts to find employment from that date on but met with no success for several years. She explained that she employed a variety of methods to search for work. Thus, each morning she combed the want ads in the newspaper seeking positions for which she felt qualified. Often, when she telephoned, she found the position was already filled. Leaving applications with other potential employers proved equally unavailing. She took a 1-week training course in resume preparation and, as a consequence, developed a resume which presented her credentials in a more professional fashion than did the handwritten one she had been using prior to that time. She also pursued some leads furnished by friends, registered with an employment agency which never contacted her after an initial interview, and placed a want ad free of cost in the local parish newsletter which produced no results.

On September 13, 1981, Murphy felt compelled to seek unemployment compensation for the first time from the Pennsylvania Bureau of Employment Security. Based on my assessment of Murphy's demeanor and character, supported by the corroborating observation of the Sisters who testified in her behalf, I have no doubt that she found this experience profoundly demeaning and was willing to accept any kind of employment to end such an ordeal. As required by the Bureau, in order to obtain benefits, Murphy had to submit a weekly record documenting her attempts to obtain work. While at the Employment Bureau, she would scan the bulletin board for possible positions, but found none for which she was suited.

Until December 1984, when the Board issued its decision in the underlying unfair labor practice proceeding and the compliance officer for the Board's Regional Office advised her of the need to maintain records, the only documentation Murphy maintained of her job searching efforts were employment cards she submitted to the the State Employment Bureau. Unfortunately, when she tried to retrieve these records, she learned that they had been destroyed in a fire. Burkholder confirmed that he learned first hand that a fire at the state agency had destroyed records, including Murphy's, in Feburary 1984.

As an alternative, Murphy attempted to construct from memory a list of employers with whom she sought positions in the preceding years, but was able to recollect only 35 different names. (See GCX 15.) The backpay specification shows that Murphy was unemployed until the fourth quarter of 1983 when a part-time position for which she had applied some months earlier, as a teacher's aide under a Federal program at St. Bonaventure's school, became available. While holding this job, Murphy continued to seek additional work and found a part-time position at a bookstore for several brief periods of time.

In attempting to prove that Murphy's job search was inadequate, Respondent adduced testimony from Dr. Paul Andrisani, Associate Dean of the School of Business and Management at Temple University, and an expert in labor market economics and human resource management. After reviewing Murphy's resumes, Dr. Andrisani formed the opinion that she was eminently employable. Although he acknowedledged that the job market in the Philadelphia area was generally depressed in the early 1980s, he believed that there was growth in the service sector which encompassed the sorts of jobs for which Murphy would be qualified. However, some of the documents on which he relied did not support his testimony in this regard. Among other things, he relied on data collected by the United States Bureau of Labor Statistics which compared wage rates among various types of office clerical workers in the Philadelphia metropolitan area. Notwithstanding the expert's claims about expansion in such fields, these charts showed attrition rather than an increase in many categories between 1980 and 1983. (Compare, e.g., numbers of telephone operators/receptionists, receptionists, file clerks, and order clerks between 1980 and 1983, GCX 25–28.) Nevertheless, he maintained that his research and other studies with which he was familiar supported his position of growth in sevice-overted jobs. Consequently, be testified that he was surprised to find that someone with Murphy's experience, skills, maturity, and stable employment history remained unemployed for an extended period of time.

On cross-examination, Dr. Andrisani conceded that he was unaware that Murphy had been fired for union activity and for refusing to submit to a psychological evaluation. Without speculating on the impact these factors might have on one's likelihood of success in finding new employment, he did acknowledge that some employers might look with disfavor on an applicant with long-term ties to a labor union.

Discussion and Concluding Findings

Applicable Legal Principles

The legal principles which generally govern resolution of backpay disputes are firmly entrenched in Board and court precedents. Briefly stated, they provide that:

> the finding of an unfair labor practice is presumptive proof that some backpay is owed . . . and that in a bakckpay proceeding, the sole burden on the General Counsel is to show the gross amount of backpay due—the amount the employees would have received but for the employer's illegal conduct. . . . Once that has been established, ''the burden is upon the employer to establish facts which would mitigate that liability. . . .'' It is further well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. [Citations omitted.][4]

The Overtime and Christmas Bonus Issues

The Respondent does not object to the compliance officer's reliance on Murphy's actual earnings during the half year immediately preceding her discharge nor does it contest the rates of pay set forth in the backpay specification. However, Respondent does challenge Burkholder's decision to factor overtime into the estimates of the hours Murphy would have worked even though his projections were based on averaging the exact hours of overtime Murphy worked in the representative period preceding her discharge. Respondent argues that projected earnings for Murphy during the backpay period should be based solely on a workweek of 35 hours for she had no entitlement to overtime which was assigned on a discretionary basis by the supervisor.

Because the compliance supervisor relied on Murphy's actual employment record to estimate her future earnings, it is eminently reasonable that he included in those projections, the number of hours she actually worked overtime. Indeed, in selecting a backpay model based on averaged hours and earnings in a representative pay period, the compliance supervisor was altogether justified, if not required to take into account ''overtime hours worked during the pre-unfair labor practice period.'' See NLRB Casehandling Manual (Part Three), section 10530.40–10540 (Apr. 1989). In this case, where the record shows that the Respondent reinstated Murphy with great reluctance, and that she has filed several grievances challenging Respondent's refusal to accord her overtime opportunities since her return, it is particularly appropriate that Burkholder relied on her working hours as they existed during the representative period prior to the time she became the victim of Respondent's discriminatory treatment.[5]

[4] *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 168–169 (1983); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

[5] Murphy testified that at the time of the hearing, she had several grievances pending to challenge the denial of overtime to her. She maintained that pre-

Continued

Accordingly, projected earnings based on the assumption that Murphy would have continued to work overtime hours during the backpay period comparable to that assigned during the model period was an acceptably sound and Board-approved method of calculating her gross backpay.

The Respondent also contended that Murphy would not have received a Christmas bonus in 1982. To prove its contention, Respondent offered certain documents into evidence subsequent to the hearing; namely, the 1982 payroll records of two employees which show no any payment other than hourly wages in December 1982, and an affidavit of Shirley Schwartz, Respondent's personnel administrator, in which she attested that on reviewing the payroll ledgers, she determined that no employees, including those in the bargaining unit, received a Christmas bonus in 1982.

Although the Charging Party agreed that backpay should not include a 1982 Christmas bonus, the General Counsel did not. He maintained, in effect, that because the administrator did not have firsthand knowledge about the bonus issue, Respondent should have adduced more than the wage records of just two employees, particularly because such evidence was within its control.

It is true, as the General Counsel contends, that the Respondent bears a heavy burden of proving that Murphy would not have received a Christmas bonus in 1982, particularly because it was guaranteed in her collective-bargaining agreement. However, I conclude that Respondent has met its burden of going forward by presenting the personnel administrator's affidavit. If the General Counsel wished to challenge Schartz' averments, he could have requested that the record be reopened so that he could cross-examine her or demand that documents be pursuant to subpoena. Having failed to pursue such options, the administrator's attestations stand uncontradicted and are sufficient to show that Murphy is not entitled to reimbursement for a Christmas bonus in 1982.She is, of course, owed compensation for such bonuses in other years during the backpay period, as reflected in the amended specification.

In sum, apart from the 1982 Christmas bonus, I conclude that the General Counsel has demonstrated that the computations of gross backpay set forth in the backpay specification were reasonably designed to approximate the amount of backpay that Murphy would have received absent her unlawful discharge.

Respondent has failed to mitigate its backpay liability

Issues Related to Murphy's Stay at a Convent

Once a gross backpay figure has been determined, interim earnings are deducted to derive the net backpay due. At this point, the employer may produce evidence which mitigates its backpay liability by showing that the claimant ''willfully incurred a loss of earnings during the backpay period, or for some other reason is not entitled to receive backpay for the period of discrimination.''[6]

To prove that Murphy willfully withdrew from the labor market while residing at the convent, Respondent selectively relied on a limited number of facts, and took them out of context. For example, Respondent pointed out that according to the nuns of St. Bonaventure's convent, Murphy was sick and very stresed during her stay there and as she entered into convent life, devoted herself to assisting the Sisters by doing chores. From these few circumstances, Respondent constructed a theory that Murphy had neither time nor energy to seek outside work with requisite diligence. Instead, according to the Respondent, she retreated to the convent where she dedicated herself totally to helping the members of her newly regained family and, in so doing, willfully withrew from the job market. For the reasons set forth below, I find that Respondent's assertions are based on inaccurate inferences drawn from a myopic reading of the record.

Respondent ignores probative evidence which supports inferences far more convincing than the ones it has chosen to draw. First, Respondent does not mention that although the Sisters found Murphy sick in body and spirit when she returned to the convent, they also testified that her condition did not prevent her from searching for employment throughout the period of time she reside with them at the convent.[7] Although they evidently were sympathetic to Murphy's plight, I find them to be exceedingly credible witnesses whose testimony was devoid of exaggeration or embellishment.

Respondent also failed to recognize that an individual who obtains unemployment compensation in Pennsylvania must demonstrate that she has actively searched for work. Thus, by qualifying for unemployment benefits with the state agency (a fact Respondent does not contest), Murphy proved that she was was engaged in a job search. See *Daniel's Pallet Service*, 297 NLRB 395 (1989); *Teamsters Local 164*, 274 NLRB 909, 913 (1985). She did not wait on line merely to feed at the public trough. As both she and the Sisters testified, merely to apply for such benefits was a humiliating experience for her.

Further, Sister Francis indicated that at least part of Murphy's stress was related to her losing her job and inability to find new employment. Sister Keltz added that Murphy was frantic to find work and went on job interviews at least three times a week. It is illogical to assume that Murphy would willfully withdraw from the labor market for almost 2 years when it was the absence of employment that gave rise to her distress. In fact, the picture that emerges from the entire record is that Murphy was an industrious, conscientious, and responsible woman. She spent all her adult life supporting herself; she worked for Respondent for 15 years and became its most senior employee. A woman of Murphy's character and employment history, who feels degraded at having to accept unemployment payments, would not willingly remain idle.

Indeed, Murphy was anything but idolent while at the convent. As Respondent noted, she entered into convent life and assisted in a variety of chores. However, her tasks took about 2 hours a week of her time and were performed in the latter

viously, as the office clerical with the greatest seniority, overtime was offered to her first.

[6] *Original Oyster House*, 281 NLRB 1153, 1154 (1986), enfd. 822 F.2d 412 (3d Cir. 1987).

[7] Although I find that Murphy was available for work as of July 27, 1981, it is unclear whether she began to seek interim employment on that date or whether her job search began in earnest once she took up residence at the convent in August. Even if Murphy did wait a week or so to begin job hunting, this does not imply a failure to mitigate ''for there is no requirement that an employee wrongfully terminated must instantly seek new work.'' *Rainbow Coaches*, 280 NLRB 166, 180 (1986), quoting *Electrical Workers IBEW Local 401 (Stone & Webster)*, 266 NLRB 820, 873 (1983).

part of the day. Such activity didnot necessarily interfere with her pursuit of employment.

The Respondent insists that Murphy received room and board in exchange for her labors at the convent; hence, a value should be ascribed to such benefits as '' perquisites of interim employment'' to offset its backpay obligation as prescribed by section 10530.1(e) of the NLRB Casehandling Manual. It is true that Murphy received room and board while at the convent; it also is true that she performed many chores for the Sisters there. But it does not follow that one was the quid pro quo for the other. Murphy and the Sisters testified consistently and credibly that she undertook these tasks voluntarily; not out of compulsion or obligation, but because she felt a personal need to demonstrate her gratitude to those who were supporting her spiritually and materially. Thus, the shelter and sustenance which Murphy received at the convent was given freely as a gift or charity; not in exchange for services. See *Original Oyster House*, supra at 1155. Murphy's contributions were no different from those that any cooperative member of a household might perform without expectation of reward. As such, and because at the same time, Murphy maintained her permanent residence, the compliance supervisor correctly distinguished Murphy's situation from those within the intendment of section 10530.1(e) of the NLRB Casehandling Manual and correctly decided that her room and board at the convent should not be valued as income so as to reduce Respondent's backpay obligation.

Murphy Diligently Searched for Employment

The Board's standards for evaluating the reasonableness of a discrimina- tee's efforts to obtain new employment were recently rearticulated in *Delta Data Systems Corp.*, 293 NLRB 736 (1989):[8]

> It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard or diligence, i.e., he or she need not exhaust all possible job leads. Rather it is sufficient that the discriminatee make a good faith effort. . . . The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a ''clearly unjustifiable refusal to take desirable new employment.'' Uncertainty in such evidence is resolved against the respondent, as the wrongdoer. [Citation omitted.]

To establish that Murphy did not exercise due diligence in seeking alternative employment, Respondent relied heavily on the expert testimony of Dr. Andrasani. On evaluating his testimony in light of the standards quoted above, I conclude that Respondent has failed to show that Murphy's efforts to obtain interim employment were inadequate.

In substance, Dr. Andrisani stated that someone with Murphy's qualifications, would be likely to obtain new employment given the expanding number of jobs in the service sector. Respondent submits that the expert's testimony proves that Murphy could not have made ardent efforts to find employment. For the reasons discussed below, Respondent's reliance on his expert's testimony is misplaced.

At the outset, a serious question exists as to the accuracy of Dr. Andrisani's fundamental premise concerning the abundance of clerical jobs. As described in the fact statement above, some of the dates on which the expert relied showed a reduction, not an increase, in the very occupations for which Murphy was qualified.

However, even if the expert was correct about the general availability of service sector opportunities, such evidence is insufficient to satisfy the Respondent's duty to prove that the claimant did not seek or refused to accept suitable employment. Here, Respondent adduced the expert's testimony to imply that because comparable work was plentiful, Murphy could not have exercised reasonable diligence in seeking work because she remained unemployed. This attempt to equate Murphy's lack of success with a lack of trying is a bootstrap argument that runs counter to Board and court precedent. It is well settled that ''[r]espondent's burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings; rather, Respondent must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work.'' *Boilermakers Local 27 (Daniel Construction)*, 271 NLRB 1038, 1040 (1984), citing *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1976). Accord: *December 12, Inc.*, 282 NLRB 475, 477 (1986).

In accordance with the foregoing principle, the Board has refused to rely on expert testimony, similar to that offered in the instant case, where a professor of economics was unable to relate general conditions in a segment of the job market to the particular circumstances affecting the claimant's success of lack thereof. See *Rainbow Coaches*, supra at 180–181. Similarly, in *Delta Data Systems Corp.*, supra, the administrative law judge rejected both the testimony of a labor market analyst and statistical compilations of job availability on the grounds that such evidence failed to prove the extent to which the discriminatee ''had access to substantially equivalent, or for that matter, suitable employment.''

Here, like the experts in the above-cited cases, Dr. Andrisani was referring to the probability of job opportunities, not to a given individual's situation. This qualification is particularly important because the expert admitted forming his opinions without knowing the specific circumstances attending Murphy's discharge. He readily conceded that an applicant with long connections to unions might meet with adverse reactions from prospective employers. It takes no special expertise to appreciate the difficulties an applicant might encounter if compelled to admit that her previous employer had conditioned her return to work on submitting to a psychological evaluation. Dr. Andrisani speculated that many employers never ask for references, thereby implying that they need not find out about past misfortunes. In Murphy's case, he was wrong. She testified credibly that although she tried to evade the subject, on many occasions, she was required to describe the reason for her discharge on job applicaion forms or during the interviews for employment.

Dr. Andrisani also implied that Murphy could not have pursued interim employment diligently based on his understanding that her entire job search throughout the backpay period consisted of seeking positions with only the 35 employers listed on General Counsel's Exhibit 15. He reached

[8] Quoting *Lundy Packing Co.*, 286 NLRB 141 (1986).

this erroneous conclusion because he started with a faulty premise. Murphy's job search was not confined to 35 employers. General Counsel's Exhibit 15 was simply a rough list she culled from memory when several years after the fact she was asked to recollect where she had sought work. She never claimed that this list was exhaustive or covered more than her job searching efforts in 1982. In fact, other exhibits, taken with her testimony, reveal that her efforts were more extensive than this list indicated. For example, she searched for jobs at a number of stores that were not listed on General Counsel's Exhibit 15, and although she could not recollect their exact addresses, she did recall encountering Respondent's counsel when she emerged from one such business. Her applications for positions with a bank, a life insurance company, and a day care center, where she returned several times to observe the children, were in addition to the 35 listed in the Government's exhibit. (See GCX 14, 16, and 19.) It also is reasonable to assume that she could not have obtained unemployment compensation from the State Bureau had she listed only 35 employers on the weekly records she was required to submit there.

She should not be faulted because a fire destroyed the records she submitted to the state agency, nor because she was less than punctilious in her recordkeeping. The Board long has recognized that it is not unusual or suspicious that claimants cannot remember the names of employers or where they applied. *Neely's Car Clinic*, 255 NLRB 1420 (1980); *Amsher Associates, Inc.*, 234 NLRB 791, 792 fn. 7 (1978). Poor recordkeeping or uncertain memory will not necessarily disqualify employees for backpay. *December 12, Inc.*, supra at 477. This is particularly so where, as here, the uncertainties in documenting employment opportunities occur after a long time has elapsed and where the employer was responsible for the lengthy interval following the unlawful discharge. *Teamsters Local 164*, 274 NLRB 909, 913 (1985). Where such ambiguities exist due to no wrongdoing by the discriminatee, they should be, and here are, resolved in her favor.[9] Id.

Thus, I conclude that Respondent has failed to sustain its burden of showing that Murphy failed to make diligent efforts to find suitable employment or that she rejected any position offered to her. To the contrary, although the General Counsel bears only a limited burden of proving the amount of gross backpay owed, here the Government went further and showed that Murphy made persistent efforts to find work. In fact, in seeking employment, Murphy utilized many of the methods which Dr. Andrisani recommended. She pursued leads in the newspaper want ads, and those given by friends; she registered with an employment agency, improved her resume, and left applications wherever she thought jobs she could handle might be found. The record in this case fully supports the conclusion that Murphy exercised a reasonable degree of diligence in searching for interim employment.

When Murphy finally found employment in the last quarter of 1983 as a school aide under a federally funded program, she retained this post with the same stability demonstrated during her many years of service with the Respondent. In addition, she continued to search for and on brief occasions found other employment to supplement her income. After searching for full-time work without success for more than 2 years, Murphy cannot be faulted for accepting the teaching aide position even though it was part-time and paid less than one-fourth of what she would have earned had the Respondent not fired her. See *Rainbow Tours*, supra at 104.

In sum, as Respondent has failed to show that Murphy did not make a good-faith search for employment after her unlawful discharge, I conclude she is entitled to an award of backpay from July 27, 1981, to November 24, 1986, in the amount set forth in the backpay specification as amended, less the sum alleged as a 1982 Christmas bonus and $20 unreported interim earnings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, United Food and Commercial Workers International Union, Local 1357, Philadelphia, Pennsylvania, its officers, agents, representatives, shall make whole Elizabeth Murphy by paying her $104,389.57 as net backpay plus interest thereon accrued to the date of payment and computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as well as payment to the pension plan in Murphy's behalf the amount of $9,213.92 plus interest.[11]

[9] Respondent questioned Murphy's credibility by suggesting that she purposely concealed interim earnings from a short-lived job with a candy store. I am certain that Murphy's failure to report the $20 she earned on this job was inadvertent and due to the lapse of time. However, the sum should be deducted from the amount of backpay owed.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).